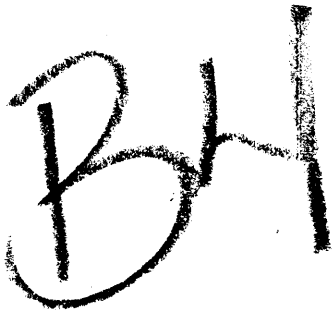

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS AAO, 20 Mass., 3/F
Washington, D.C. 20536

[redacted]

APR 17 2003

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, California Service Center. Subsequently, the beneficiary applied for adjustment of status. On the basis of new information received and on further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director served the petitioner with a notice of her intention to revoke the approval of the preference visa petition. The petitioner failed to submit a timely response. The director subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation which claimed to be engaged in the international export of automobiles, agricultural equipment and foodstuffs. The petitioner seeks to employ the beneficiary as its president. Accordingly, the corporation has petitioned to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The director approved the immigrant petition on August 17, 1995.

Based on information discovered during a field investigation by the Service's San Francisco Investigations Division, as well as further review of the record, the director issued a notice of intent to revoke the approval on March 6, 1997. The director determined that the petitioner was not engaged in the export of automobiles, as previously indicated in the L-1 and I-140 petitions. Furthermore, the director determined that the beneficiary was not employed in a primarily managerial or executive capacity. Finally, the director stated, "The bonafides of the petitioning business (as listed and described in the petition) are highly questionable." Consequently, the director concluded that the instant petition fails to represent the petitioner's proposed business activities. The petitioner failed to respond to the notice of intent to revoke. Based on that determination, the director revoked the approval of the petition on March 7, 2001.

On appeal, counsel for the petitioner asserts that the director did not properly revoke the approval of the petition. Counsel states that neither the petitioner nor the petitioner's counsel received the director's notice of intent to revoke, which was mailed to the petitioner's business address of record in San Francisco, California. However, as clarified in the italicized portion of the revocation notice, counsel's change of address was entered into the electronic record of a related L-1A case of a different beneficiary, not for the beneficiary in the instant case. The director further noted that based on several advanced parole documents filed by the beneficiary in December 1997, and later in April 1998, he too had had a change of address of which the Bureau had not been notified. Accordingly, due to failures, on the part of both the beneficiary and counsel himself, to notify the Bureau of important address changes, counsel cannot fault the Bureau for

untimely receipt of the Bureau's notice of intent to revoke.

Counsel further states that the Bureau's visits to the petitioner's place of business were too brief to uncover sufficient evidence to conclude that the petitioner does not engage in the export of automobiles. The burden of establishing eligibility for an immigrant visa preference is entirely on the petitioner, however. Section 291 of the Act, 8 U.S.C. § 1361. Thus, where, as in this instance, the petitioner is presented with adverse information, it is the petitioner's burden to provide documentary evidence to establish eligibility. Merely arguing that the Bureau failed to provide sufficient proof of the petitioner's ineligibility for an immigrant visa preference cannot meet its burden of proof.

The Bureau is not persuaded by counsel's claim that the Bureau did not properly mail the director's notice of intent to revoke. The director mailed the notice to the petitioner's last known address, as listed on the I-140 petition. Furthermore, counsel has clearly received the intent notice, as is evident by the fact that a copy of the notice has been submitted by counsel as one of the exhibits on appeal. In turn, counsel has had the opportunity to review the notice, since he has addressed the merits of the notice in his appellate brief. There is no evidence to indicate that the petitioner advised the Bureau, in writing, of a change in address prior to the issuance of the director's notice. *See* 8 C.F.R. § 103.5(a)(2)(iii).

Generally, the decision to revoke approval of an immigrant petition will be sustained, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. *Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). For this reason, the decision of the director will be affirmed and the appeal will be dismissed. However, the issues raised by the director will be discussed further.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or

[redacted]

> an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

Aside from questioning the validity of the petitioner's business, the director also raised the issue of whether the beneficiary has been and will be employed in a primarily managerial or executive capacity.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties

unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily--
>
> (i) directs the management of the organization or a major component or function of the organization;
>
> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and
>
> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioning company seeks to employ the beneficiary as its president. In the initial petition, an employment letter described the beneficiary's activities as follows:

1) To direct and supervise all officers of the company, to determine company personnel requirements and to hire accordingly, to act on behalf of the corporation in the formation and satisfaction of contracts, to report on the state of the corporation to the directors, and to supervise and coordinate activities with affiliated companies.

2) To plan, organize and direct product development activities, to identify and negotiate supply contracts with U.S. product distributors, to manage and direct the production and sale programs of the company, to evaluate the potential of American products for sale in Russia, and to supervise the satisfactory completion of contracts entered into by the company.

3) To research and identify suitable investment and development opportunities for the company, and to supervise the formulation of marketing programs for all company products.

The employment letter was signed by the petitioner's financial director, [redacted]. An investigation by Bureau officers revealed that Mr. [redacted] was actually doing car repair estimates for clients. While undergoing an interview conducted by the Bureau officers during the initial investigation, Mr. [redacted] claimed to be the shop's manager and stated that he fixed three cars which were subsequently shipped abroad.

Bureau officers conducted another investigation several months after the initial investigation discussed above. The investigators observed stick-on lettering, at the rear of the business premises, which revealed "Koro Car Repair" as the business's name. Mr. [redacted] told the investigating officers that the beneficiary works by himself, from his own home, and does not supervise anyone. Rather, Mr. [redacted] claimed that both he and the beneficiary were responsible for shipping several vehicles to Russia. Based on the information discovered during the Bureau officers' investigation of the petitioner's business premises and on the evidence of record, the director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the Bureau failed to "credibly argue" that the beneficiary was not carrying out the managerial duties claimed in the petition. Despite the Bureau's investigations, counsel submitted no new evidence to affirmatively establish that the beneficiary has functioned as a manager or executive. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant case, counsel's attempts to resolve the factual inconsistencies of this case by imporperly shifting the burden of proof on the Bureau. However, as previously stated in this decision, the burden of establishing the beneficiary's eligibility for an immigrant visa preference remains solely that of the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

There is no evidence to establish that the beneficiary has been performing and will continue to perform primarily managerial or executive duties. Section 101(a)(44)(A)(iv) clearly states that "[a] first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." In the instant case, the person claimed to be the petitioner's financial director has stated that the beneficiary does not supervise anyone, but rather works from his own home and has, on occasion, been directly responsible for shipping vehicles overseas. Precedent case law has established that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial

or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity. Further, the record does not convincingly demonstrate that the beneficiary has been performing duties that are primarily managerial or executive in nature. While the duties attributed to the beneficiary sound managerial, the petitioner has submitted no evidence to establish that those duties are actually being performed by the beneficiary as claimed. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing nonqualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title.

The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence establishing its ability to pay the beneficiary's proffered wage of approximately $36,000 per year. *See* 8 C.F.R. § 204.5(g)(2). Although the petitioner has submitted numerous Internal Revenue Service (IRS) Form 941, quarterly tax statements, which indicate the amount of wages paid, the only income tax return the petitioner has submitted was for 1994, the year in which the entity was established. None of the beneficiary's IRS Form W-2, wage and tax statements, have been submitted; thus, no evidence indicates that he has, indeed, been paid the weekly sum of $692 which is claimed on the petition. However, as the appeal is being dismissed on other grounds, this issue need not be addressed further.

As reinforced numerous times in this decision, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed, and the petition will be denied.

ORDER: The appeal is dismissed.